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In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM J. RIALS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court issued no written opinion. The court of appeals rendered a per curiam order of affirmance (Pet. App. A-1).

JURISDICTION

The judgment of the court of appeals was entered on December 14, 1979. The petition for a writ of certiorari was filed on January 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's right to a fair trial was violated by the admission of certain testimony, even though the evidence was later stricken and the jury was instructed to disregard it.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of one count of conspiracy to evade federal income taxes, in violation of 18 U.S.C. 371, and four counts of aiding and abetting the evasion of corporate and personal federal income taxes, in violation of 26 U.S.C. 7201. Petitioner was sentenced to three years' imprisonment, to be followed by five years' probation, and a $30,000 fine. The court of appeals affirmed.

Petitioner served as president and 50% stockholder of SEMAC Industries (formerly known as Machinery Buyers Corp.), a corporation in the business of buying and selling heavy construction equipment in the United States and abroad. Testimony adduced from co-conspirators[1] and employees of SEMAC showed that petitioner conspired with certain other owners of the corporation to divert corporate funds generated by several international transactions for use as personal "fun money." It was agreed that this "fun money" would not be reported on any corporate or personal income tax returns.

The "fun money," amounting to more than $350,000, consisted of the repayment of a $168,000 loan SEMAC had made to one of two Puerto Rican corporations and rental payments the two corporations were making to

[1]Ray Strickland and Arthur Cates, each of whom had an ownership interest in SEMAC, testified for the government under grants of immunity.

SEMAC under an agreement whereby they paid rent on machinery SEMAC had ordered from them if it was not delivered by a certain date (II-R. 17-22, 25, 29-30, 52-60, 70-76, 78-84, 90-92, 96-104).[2] Evidence at trial showed that the income generated by the transactions in question was not reported on the corporate tax returns or the personal tax returns of any SEMAC officers (II-R. 19, 34, 54-55, 64-65, 74, 96-110; III-R. 69-92).

The participants in the scheme were admonished not to place any of the money in a bank where it could be traced. Petitioner further instructed them regarding a cover story to be used if anyone should question the transactions. It would be claimed under the cover story that the money was used to pay a finder's fee to a fictitious person named Fleming (II-R. 19-23, 53-56).

Special Agent Benjamin McMakin of the Internal Revenue Service testified at trial to statements made to him by SEMAC's attorney, Michael Ginsberg, who was acting for SEMAC under a power of attorney executed by petitioner as its president. At the time Ginsberg made these statements, only the corporation was under investigation (III-R. 31). During the interview, Ginsberg would leave the room after being questioned by McMakin and consult with petitioner and a certified public accountant in an adjoining room; Ginsberg would then return and answer the question (III-R. 13-17, 23-28). McMakin testified that during the interview he was told by Ginsberg that the entire amount of monies paid to SEMAC by two Puerto Rican corporations had been received by corporate officers of SEMAC and immediately used to pay finder's fees to two individuals, Gordon Fleming and Gordon Natrass; that neither the receipt nor

[2]"R." references are to the record in the court below.

the payment of these monies was recorded on the corporate records or corporate tax returns; that Natrass and Fleming would deny receiving any finder's fees from SEMAC; and that it would not be possible to locate Fleming (III-R. 81-82). Natrass testified that he never received any finder's fees in cash from anyone associated with SEMAC, but that he had received $40,000 in such fees by check (III-R. 57).

Prior to this testimony, petitioner had objected to its admission on the ground that there was no indication in the record that petitioner ever authorized Ginsberg to make a statement on his personal behalf and that Ginsberg was not, in fact, an authorized representative of petitioner in his individual capacity. Petitioner also argued that the record was insufficient to establish that any statement made by Ginsberg originated with petitioner, as opposed to the certified public accountant in the room with him or some other individual (III-R. 46). The court nevertheless chose to allow the witnesses to testify.

After McMakin and Natrass completed their testimony, however, the court concluded that the evidence should not have been admitted after all. The court reasoned that because the statements had been made by Ginsberg as the agent of the corporation, and not as the personal agent of petitioner, they were not admissible against petitioner (III-R. 107-108, 110). Petitioner then moved for a mistrial (III-R. 111). The court, in denying petitioner's motion, stated (*ibid.*):

> I don't believe I have heard any more evidence than I have heard in any criminal case more overwhelming than this one; * * *.

Before petitioner moved for a mistrial, the court had similarly stated that it was "convinced that there is so much evidence with respect to the overall scheme that the admission of that testimony is not reversible error * * *" (III-R. 108). The following day, the court, in its instructions to the jury, directed the jury to disregard the testimony of McMakin and Natrass (IV-R. 25-27). The court told the jury this evidence was "completely untrustworthy," "not to be considered," and "to be completely disregarded" (IV-R. 26-27).

ARGUMENT

Petitioner contends (Pet. 9-14) that he was denied his right to a fair trial by the admission of the testimony of McMakin and Natrass, even though the jury was instructed to disregard that testimony. This argument is without merit.

First, it is by no means clear that the district court erred in admitting the testimony in the first place. If petitioner, in his capacity as president of SEMAC, had spoken directly with the IRS Agent McMakin, his statements would have been admissible against him as an individual. Fed. R. Evid. 801(d)(2)(A) provides that a statement is not hearsay if offered against a party and consists of "his own statement, in either his individual or a representative capacity." The result should be no different here because petitioner spoke through Ginsberg, whom petitioner had granted a power of attorney on behalf of the corporation. In this regard, Rule 801(d)(2)(C) provides that a statement is not hearsay when offered against a party if it was made "by a person authorized by him to make a statement concerning the subject," and Rule 801(d)(2)(D) provides that a statement is not hearsay when offered against a

party if it was made "by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship."

But even if the statement should not have been admitted, it is plain that no reversible error was committed. The general rule is that striking erroneously admitted evidence and admonishing the jury to disregard it serves to cure the error. See, *e.g.*, *Bruton* v. *United States*, 391 U.S. 123, 135 (1968); *United States* v. *Rojas*, 537 F. 2d 216, 222 (5th Cir. 1976). Reversal is required only if a significant possibility exists, considering all other evidence presented, that the erroneously admitted evidence had a substantial impact upon the verdict of the jury. *Ibid.*

Here, of course, the trial court struck the testimony and exhibits relating to petitioner's statements about the finder's fees and fully and carefully instructed the jury to disregard this evidence (IV-R. 22, 25-27). The testimony of which petitioner complains is contained in less than seven pages (III-R. 57-60, 80-82) out of a trial transcript of well over 500 pages. The remaining evidence, the admissibility of which is not disputed, was overwhelming. That evidence included the extensive testimony of petitioner's co-conspirators, Cates and Strickland, who were vice presidents of SEMAC (I-R. 68-119; II-R. 16-69); bank records in Mexico, the Cayman Islands, and New York that reflected the receipt and subsequent disposition of the funds received from the Puerto Rican corporations (II-R. 156-158, 178-180); the testimony of officials of the Puerto Rican corporations (II-R. 70-89); written records of the supplemental agreements between SEMAC and the Puerto Rican corporations (II-R. 70-73); letters from petitioner and his co-defendant, Stanley E. Galkin, the secretary of the corporation and the owner of

30% of its stock, directing that the payment of funds due from the Puerto Rican corporations be made payable to them or their Cayman Islands corporation, International Equipment (II-R. 78-79); the pilot's logs of the trips to Puerto Rico, the Cayman Islands, and New York to deliver and pick up money, and the testimony of the pilot about these trips (II-R. 170-177); and the testimony of other SEMAC employees who had access to documents evidencing the diversion of corporate funds or who had overheard petitioner's plans to divert corporate funds (II-R. 99-112, 119-145).

Thus, the evidence of petitioner's guilt clearly overwhelmed any possible prejudicial effect of the disputed evidence, even assuming that evidence was improperly admitted. Considering that the court struck the disputed evidence and instructed the jury to disregard it, there was no significant possibility that the evidence had a substantial impact upon the verdict of the jury. Accordingly, the court of appeals correctly rejected petitioner's claim that he had been deprived of a fair trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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